No. 89-691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCOTT C. TYLER, individually; SHEILA LYNN TYLER; DEBRA DENISE TYLER; JENELLE LORRAINE TYLER, by SCOTT C. TYLER, her father and next friend; BRYAN KENT TYLER, by SCOTT C. TYLER, his father and next friend,

Petitioners,

vs.

RICH BERODT; SANDRA BERODT; EVERETT HOWARD; SCOTT COUNTY, IOWA; FORREST ASHCRAFT, SCOTT COUNTY SHERIFF,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK D. CLEVE
JOHN D. STONEBRAKER
(Counsel of Record)
McDONALD, STONEBRAKER & CEPICAN, P.C.
P.O. Box 2746
Davenport, Iowa 52809
(319) 355-6478

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTION PRESENTED FOR REVIEW

1. Whether established Fourth Amendment law fully resolves petitioners' claims of a reasonable expectation of privacy in communications broadcast from a cordless telephone unit in or near their residence to another ordinary cordless phone unit.

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STATEMENT OF THE CASE

A. Proceedings Below

Respondents do not accept petitioners' Statement of the Proceedings Below. Petitioners' Statement is overly argumentative. However, respondents have elected not to recast the Statement since the Findings and Opinions of the lower courts are set forth verbatim for the Court's consideration in petitioners' appendix.

B. Factual Background

Respondents do not accept petitioners' Statement of the Facts.

The record shows that by means of their own ordinary cordless telephone, respondents Rich and Sandra Berodt overheard and recorded the conversations of Petitioner Scott C. Tyler, who was later charged with and convicted of felony theft and conspiracy on the basis of criminal activity discussed over his cordless telephone.[1]

The Berodts were able to receive the communications broadcast from petitioners' cordless telephone unit without making any modifications or additions to the technological components of their own cordless unit. To more clearly receive these communications, the Berodts merely had to unplug the base unit of their own cordless phone.[2] The owners' manual for the petitioners' cordless phone informed them that others with cordless telephones could overhear communications broadcast by the petitioners' unit, by warning them that they might overhear communications from other cordless telephones operating in the area on the same frequency. The owners manual further informed petitioners that the broadcast range of their cordless unit could exceed 700 feet, depending on local operating conditions. The only "security system" described in the petitioners' owners' manual does not state or imply that the user's calls are not subject to interception by other cordless units. According to the manual, the system only prevents other cordless units

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[1] Deposition of Sandra Berodt, October 30, 1984 at pp. 1-56, petition at pp. 9, 11, and petition appendix (hereinafter pet. app.) at p. 13.

[2] See n.1, *supra*, Berodt deposition at pp. 10-11. Furthermore, the record is bereft of any indication that law enforcement authorities played any part in the Berodts' discovery of how to more clearly receive these broadcast communications.

from transmitting to the owner's unit when it is not in use.[3] The remaining facts pertinent to this matter are set forth in the Federal District Court's 5/18/88 ruling granting respondents' Motion for Summary Judgment. (pet. app. pp. 10-14)

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals applied the well-established Fourth Amendment objectively reasonable expectation of privacy standard to petitioners' claims of privacy in communications broadcast from their cordless telephone unit to another ordinary cordless phone unit.

The question presented does not require resolution by this Court because the record amply supports the Court of Appeals' application of the facts to the objectively reasonable expectation of privacy standard.

This Court should deny the writ because petitioners have utterly failed to present any reasonable legal or public policy justification for deviating from well-established Fourth Amendment law to bestow an objectively reasonable expectation of privacy upon cordless telephone users, when users of this optional convenience have every reason to expect that such communications can be readily overheard by other individuals using commonly available, ordinary types of radio-based communications equipment.

The decisions of the Eighth Circuit Court of Appeals does not conflict with prior decisions of this Court.

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[3] See pp. 2, 4, of portions of petitioners' owners manual attached to Public Defendants' Memorandum in Support of Renewed Motion for Summary Judgment filed on or about 3/7/88.

ARGUMENT

I. THE COURT SHOULD DENY THE WRIT BECAUSE ESTABLISHED FOURTH AMENDMENT LAW FULLY RESOLVES THE PETITIONERS' REASONABLE EXPECTATION OF PRIVACY CLAIMS

Petitioners concede that the court below applied the appropriate, well-established Fourth Amendment standard to petitioners' claims of privacy in communications broadcast by their cordless telephone unit. The standard applied, whether an individual possessed a subjective and a legitimate or objectively reasonable expectation of privacy in the activity or matter in issue, is derived from *Katz v. United States,* 389 U.S. 347 (1967). *Katz* has been acknowledged as the "lodestar" of Fourth Amendment law. *Smith v. Maryland,* 442 U.S. 736, 739 (1979). See also *California v. Ciraolo,* 476 U.S. 207, 211 (1986).

The same reasonable expectation of privacy analysis is also applicable to two federal statutory claims asserted by petitioners, namely §2510(2) "oral communications" in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, et seq.; and the Communications Act of 1934, 47 U.S.C. §605.[4]

The question presented does not require resolution by this Court because the record below amply supports the Eighth Circuit's application of the facts to the well-established reasonable expectation of privacy standard. The Court of Appeals considered undisputed facts showing that all communications overheard by the respondents involved radio-wave transmissions broadcast from, and received by ordinary cordless telephone units owned by the parties, and that petitioners knew or had every reason to know their conversations could be received by any cordless unit operating on the same frequency within a distance of well over two football fields in any direction from petitioners' residence. (pet. app. pp. 11-14)

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[4] *See* cases cited in pet. app. pp. 25-27.

Aside from the facts of the pending case which document the ready ability of other, standard cordless telephone units to receive petitioners' broadcast communications, the court below also had access to the findings and opinions of a number of federal and state cases, as well as 1986 amendments to 18 U.S.C. 2510 et seq., all of which clearly demonstrate the patent ease with which radio wave telephone communications can be overheard by persons using like units or other types of ordinary communications equipment commonly used by the public.[5] See *United States v. Hoffa,* 436 F.2d 1243 (7th Cir. 1970), *cert. den.* 400 U.S. 1000 (1971); *Edwards v. Bardwell,* 632 F. Supp. 584 (M.D. La. 1986) *aff'd* 808 F.2d 54 (5th Cir. 1986); *State v. Howard,* 235 Kan. 236, 679 P.2d 197 (1984); *State v. DeLaurier,* 488 A.2d 688 (R.I. 1985); *People v. Fata,* 139 Misc.2d 979, 529 N.Y.S.2d 683 (Co. Ct. 1988); Pub. L. 99-508 §101(a)(1), (2), (12) (1986); and S. Rep. No. 99-541, 99th Cong., 2nd Sess. pp. 9, 12 (1986), reprinted in 1986 U.S. Code Cong. & Ad. News, 3563, 3566.[6]

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[5] Contrary to petitioners' assertion, they did not timely raise as disputed fact issues the capacity of ordinary communication devices to overhear cordless telephone broadcasts, and the frequency of such occurrences. See Petitioners' Brief in Support of Resistance to Motions for Summary Judgment filed 3/18/88; and Motion for Re-Argument, and for Expansion of Findings of Fact, Conclusions of Law, and Alteration or Amendment of Judgment filed on or about 7/25/88.

[6] Petitioners also claim that the 1986 amendments to 18 U.S.C. 2510, et seq. are of limited significance because they merely decriminalize the inadvertent reception of cordless telephone communications. Although the amended statute does make special provisions for the inadvertent reception of several categories of communications, this type of provision is not included in its treatment of cordless telephones. Petitioner's reference to a congressional intert to merely decriminalize the interception of cordless phone communications is also a red herring. This statute, which petitioners agree is intended to implement Fourth Amendment interests, sets the parameters for both civil and criminal liability in regard to the interception of various forms of communication. *See* Pub. L. No. 99-508 §103 (1986).

In their attempt to fashion a claim of a compelling unresolved issue of Fourth Amendment law, the petitioners seek to override the facts and findings which clearly support the decision of the court below by characterizing the cordless telephone as an essential means of modern communication. The cordless telephone is in fact merely a convenient and thoroughly optional form of communication equipment.

This Court should deny the writ because petitioners have utterly failed to present any reasonable legal or public policy justification for deviating from well-established Fourth Amendment law to bestow an objectively reasonable expectation of privacy upon cordless telephone users, when users of this optional convenience have very reason to expect that such communications can be readily overheard by other individuals using commonly available, ordinary types of radio-based communications equipment.[7]

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT

The determination by the Eight Circuit Court of Appeals that petitioners had no reasonable expectation of privacy in radio-borne communications broadcast from one ordinary cordless telephone unit to another does not conflict with prior decisions of this Court. In *Berger v. New York,* 388 U.S. 41, 58-64 (1967), this Court held that the use by law enforcement authorities of certain sophisticated surveillance devices, such as electronic "bugs" placed in homes or offices and telephone wire taps, must meet the Fourth Amendment's probable cause and warrant requirements. Given the types and intended uses of the

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[7] Petitioners' brief implies that the scope of the present case extends to the privacy interest of individuals on the land line end of a telephone communication involving a cordless phone unit. In proceedings below, the Court of Appeals for the Eighth Circuit properly noted that the issue on appeal was restricted to the privacy claims of cordless telephone users. *See* pet. app. p. 26.

electronic devices involved, the *Berger* decision assumed the question at issue in the present case, namely whether the acts of the respondents amounted to a Fourth Amendment search or seizure. The Court's decision in *Berger* simply does not address, or in any way support petitioners' contention that the broadcast and reception of radio wave communications between ordinary cordless telephone telephone units constitutes a search.

In *Lee v. Florida,* 392 U.S. 378 (1968), this Court construed the "interception" element of the Communications Act, 47 U.S.C. 605, to include at least some surveillance accomplished by means of a telephone party line. Unlike the version of §605 which controls the petitioners' claims, the formulation of §605 at issue in *Lee* did not require the claimant to demonstrate a justifiable expectation of privacy in the subject communications. See *United States v. Rose,* 669 F.2d 23, 26-27 (1st Cir. 1982), *cert. den.,* sub. nom. *United States v. Hill,* 459 U.S. 828 (1982); and *Edwards v. State Farm Ins. Company,* 833 F.2d 535 (5th Cir. 1987). Furthermore, the *Lee* Court explicitly noted that it did not decide the Fourth Amendment issues raised by the petitioner in the case. 392 U.S. at 379, n. 2.

This Court's decision in *United States v. Karo,* 468 U.S. 705 (1984), does not support petitioners' claim that the case presents an unresolved Fourth Amendment issue as a result of the fact that their cordless telephone radio wave broadcasts emanated from their residence.

In *Karo,* federal law enforcement agents arranged to surreptitiously place a location-monitoring beeper in a can of chemicals purchased by a suspected drug manufacturer. After the can of chemicals was transported to a series of locations by the suspect, it was finally moved to a private residence. The agents verifed the location of the can, and its continuing presence at the residence by means of specialized electronic equipment which tracked beeper signals. Such information, along with other facts and circumstances developed in the case,

was used by the agents in an application for a warrant to search the residence. The *Karo* Court held that the agents ran afoul of the Fourth Amendment when they used their specialized monitoring equipment to confirm that the beeper was located at the residence, and to verify that it remained there for an extended period of time, when such information could not have been accomplished by ordinary visual surveillance. 468 U.S. at 714. One of the critical facts underlying the Court's holding is the agents' placement of a monitoring device in a receptacle which in the ordinary course of events allowed them to monitor its presence in a private residence. In addition to the agents' active role in causing a monitoring device to be placed in a private residence, *Karo* is distinguishable in that the agents then used specialized electronic surveillance equipment directed specifically to the covert device to verify its presence in the residence. In the present case, the respondents in no way caused a monitoring device to be placed in the petitioners' residence, nor did they direct any specialized monitoring technology at the residence. Instead, respondents merely overheard communications broadcast from the petitioners' cordless telephone through a medium, and by a means generally available to the public. *Karo* therefore does not stand for the proposition that communications broadcast by such means over the airwaves from a residence (as opposed to an office, car or some other location), implicates any separate or additional Fourth Amendment interests.

Petitioners' invocation of Justice O'Connor's concurring opinion in *Florida v. Riley,* 488 U.S. ____, 102 L.Ed.2d 835 (1989), is equally inapplicable to the question presented. In *Riley* this Court held that no search of the curtilage of an individual's property occurred when law enforcement agents observed the property while flying over it in a helicopter under conditions equally available to civilian aircraft. Justice O'Connor's concurring opinion included dicta to the effect that an individual may have a reasonable expectation of privacy if the agents had flown over the property at an altitude at which the public rarely or never travels. 488 U.S. at ____, 102 L.Ed.2d at 845.

As applied to the facts of the pending case, this dicta poses the question of whether petitioners could reasonably expect that their broadcast communications were not readily available to other individuals using ordinary types of communication equipment. The factual record in the pending case, the findings of analogous federal and state cases, and the legislative history of pertinent federal statutes, all of which were available to the court below, are replete with information by which the Court of Appeals for the Eighth Circuit could correctly determine that petitioners had no objectively reasonable expectation of privacy in radio wave broadcasts from their cordless telephone unit, since such communications are so readily and easily received by similar, ordinary types of communications equipment.

The prior decisions of this Court cited by petitioners plainly do not conflict with the decision below.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Mark D. Cleve
John D. Stonebraker
(Counsel of Record)
McDonald, Stonebraker &
Cepican, P.C.
P.O. Box 2746
Davenport, IA 52809
Telephone: (319) 355-6478

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